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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-400

Filed 19 March 2025

Pender County, No. 21 CRS 51080

STATE OF NORTH CAROLINA

v.

DANIEL JOSEPH KEMPTON

Appeal by Defendant from judgment entered 6 July 2023 by Judge G. Frank Jones in Pender County Superior Court. Heard in the Court of Appeals 25 February 2025.

*Attorney General Jeff Jackson, by Assistant Attorney General Jeremy D. Lindsley, for the State.*

*Richard J. Costanza for the Defendant.*

WOOD, Judge.

Daniel Joseph Kempton (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of voluntary manslaughter. On appeal, Defendant argues the trial court erred by denying his motion to dismiss, asserting that he sufficiently established the elements of perfect self-defense. He further argues the

trial court erred by permitting certain testimony from a crime scene investigator. For the reasons stated herein, we hold Defendant received a fair trial free from error.

### **I. Factual and Procedural Background**

On 3 July 2021, Edward Hicks (“Hicks”) was found deceased in his trailer due to multiple stab wounds after a fight ensued between Defendant and Hicks. At the time, Defendant was sixty-one years old and worked in the roofing business. Defendant had initially met Hicks in 2018 when he hired him to assist with residential roofing services. Throughout the years, Hicks worked for Defendant on an as needed basis and the two became friends. They often joked around but would occasionally argue and cuss at each other.

On the afternoon of 3 July 2021, Defendant arrived at the trailer park where Hick’s lived, intending to meet a friend named “Ashley.” Upon his arrival, Ashley was not there, but he was greeted by Hicks. Hicks suggested that Defendant stay to hang out, and the two went to Calvin Bannerman’s (“Bannerman”) trailer. Bannerman is Hick’s first cousin and lived in the same trailer park. The group drank a few beers at Bannerman’s home and hung out for a while.

Defendant, Hicks, and Bannerman then went to Hick’s trailer and continued drinking. Gary Williams, who also lived at the same trailer park, joined shortly after but had left prior to the altercation between Defendant and Hicks. What occurred next was recounted by both Defendant and Bannerman at trial, though their accounts differed slightly.

According to Bannerman, he observed Defendant and Hicks “getting along” throughout the afternoon, and they did not appear to be angry at one another. Although they were cussing at each other, Bannerman was not concerned as this was typical behavior while they were drinking. Bannerman testified the altercation began when Hicks hit the bill of Defendant’s hat with a baseball bat. Hicks then pushed Defendant in the chest with a bat, appearing to push Defendant backwards. The two began wrestling on the ground and fist-fighting, with Hicks ending up on his back and Defendant on top of him. Not long after, Bannerman noticed that Hicks was bleeding from his chest. He immediately went to William’s trailer to inform him that Hicks was hurt. As Bannerman headed back to check on Hicks, he saw Defendant “walking fast” down the road. Bannerman attempted to communicate with Hicks but quickly realized he was dead. He stayed at Hicks’ trailer until the police arrived. At trial, Bannerman testified he did not see either Hicks or Defendant with a knife during the fight.

According to Defendant, he, Bannerman, and Williams were drinking beer and watching TV at Hicks’ trailer. Hicks asked Defendant if he could borrow \$20.00, and Defendant agreed. Subsequently, an unknown individual arrived who presumably sold cocaine to Hicks because his autopsy indicated he had ingested cocaine prior to his death. After the individual left, Bannerman and Hicks sat at the table together for “a minute.” Bannerman gave Defendant a small plastic bag with a “tiny bit of

weed in it,” which Defendant put under his leg. Bannerman then lit a joint and passed it around amongst the group.

Hicks then asked Defendant for an additional \$50.00 to which Defendant responded “no” since he had “just [given Hicks] \$20.00.” Hicks replied, “Well, I [gave] you that weed for that 20 bucks.” Defendant then grabbed the weed from under his leg and said, “You must be joking me. That ain’t \$5 worth of weed.” Hicks proceeded to grab the bag of weed from Defendant and said, “How about I beat your ass and take your money.” Hicks then hit the bill of Defendant’s hat, and Defendant said he was going to leave. However, before Defendant could leave, Hicks jumped in front of the door, grabbed a baseball bat, and told Defendant he was not going anywhere.

Hicks struck Defendant on the right side of his body below his ribs and continued to jab at him with the bat, pushing him backwards into the kitchen. Defendant grabbed the bat with both hands, and they wrestled with the bat until they both fell to the floor. Defendant fell on top of Hicks, but Hicks placed Defendant in a “reverse headlock” position. Defendant grabbed Hicks’ arm in an attempt to break free and Hicks cut his hand. Defendant let go of his grip on Hicks’ arm after being cut, and Hicks began choking Defendant until he could no longer breathe. Believing that Hicks was going to kill him, Defendant grabbed his knife from his front left pocket and “start[ed] stabbing as fast [he could].” In response, Hicks loosened his hold on Defendant and Defendant attempted to get up. While doing so, Hicks grabbed

Defendant's hair. Defendant then cut Hicks underneath his left arm and was able to escape. At some point, Defendant's knife was knocked out of his hand.

As Defendant stood up, Hicks was also trying to get up and made threatening remarks to Defendant. Defendant punched Hicks twice, once in the mouth and once on the side of the head, knocking him out. Defendant ran from the trailer, called a ride, and went home. At home, Defendant washed his hands, drank a few sips of vodka, and called 911.

Pender County Sheriff's Office Lieutenant Lee Wells ("Wells") and Detective Eric Short ("Short") arrived at Hicks' trailer to assess the scene. Wells observed Hicks lying on the kitchen floor, deceased. He took photographs of the trailer, including items that appeared out of place. Specifically, he noticed a chair near the kitchen that was overturned and a small foldable table that was knocked over. Additionally, Wells noted that the back door to the trailer was boarded up, meaning the only entrance and exit to the home was through the front door. He also took a photograph of the kitchen table depicting a torn piece of paper with a white substance on it and a folded dollar bill containing the same substance. Based on his experience and training, Wells identified the substance as cocaine.

Short observed a knife and lighter laying near Hicks' feet, and a baseball bat on the ground between the living and kitchen area. From Short's observations, it did not appear to him that a "true struggle" or "brawl" had taken place, from just a chair and small table that were knocked over. The home otherwise appeared "intact" and

not in a state of disarray. Later, Detective Alexandria Rackovan (“Rackovan”) arrived to assist Wells and Short. Rackovan observed that a chair and small table were overturned, but in her opinion, the house did not “have a significant amount of disarray that you would anticipate with a significant struggle.”

Rackovan and Sergeant Evan Rochelle (“Rochelle”) went to Defendant’s home to speak with him. Defendant’s account to law enforcement differed from his testimony at trial. Specifically, Defendant told the officers that he had a little marijuana and when “they” took it from him, he got angry. He said then three men attacked him and were beating him with a baseball bat. While Defendant was down, he got his knife and cut Hicks, and the men continued to beat him up. Thereafter, the men ran down the road. Defendant did not tell the officers that Hicks had pulled a knife on him.

Upon examination, Defendant’s only observable injuries were a small cut on his left hand and a mark on his left bicep. In contrast, Hicks’ autopsy revealed “multiple sharp force injuries to the outside of the body” or stated differently, multiple stab wounds, and his cause of death due to “physical disruption of the heart and . . . bleeding to death.”

On 31 January 2022, Defendant was indicted on one count of second-degree murder for the death of Hicks. The matter was tried from 26 June 2023 to 6 July 2023. At trial, in addition to Bannerman and Defendant, the responding law enforcement officers of the Pender County Sheriff’s Office testified. The State

presented evidence of body camera footage; Bannerman's and William's subsequent interviews with law enforcement; photographs of the crime scene, Defendant's injuries, and Hicks' injuries; the 911 calls from that night; and Hicks' autopsy report.

At the close of the State's evidence, Defendant moved to dismiss the charge of second-degree murder on the basis of self-defense. He argued:

Mr. Kempton stated that he acted in self-defense when he killed Edward Hicks. The State has put on evidence showing that that happened. There's been no evidence of malice. There's no evidence that Mr. Kempton did not act in self-defense. The only witness that the State has presented of a fact witness, eyewitness, stated that the deceased picked up a bat and made contact when Mr. Kempton initiated physical contact. There was no evidence presented that -- of aggression or that Mr. Kempton instigated this -- this altercation. And based on the light most favorable to the State, they have nothing. Your Honor, we would ask it be dismissed.

The trial court denied Defendant's motion, concluding, "in the exercise of discretion, [the trial court] respectfully concludes that there is substantial evidence necessary to persuade a reasonable jury." Defendant renewed his motion to dismiss at the close of all the evidence, which the trial court also denied.

On 5 July 2023, the jury found Defendant guilty of voluntary manslaughter on the basis of self-defense with excessive force. The trial court sentenced Defendant to 84 to 113 months of imprisonment. Following sentencing, Defendant gave oral notice of appeal.

## **II. Analysis**

On appeal, Defendant argues the trial court should have granted his motion to dismiss, since the evidence established that he had engaged in perfect self-defense as a matter of law. Defendant further argues the trial court erred by allowing Short to testify a “true struggle” did not occur in Hicks’ trailer. We address each in turn.

#### **A. Motion to Dismiss**

“We review the trial court’s denial of a motion to dismiss *de novo*.” *State v. Faucette*, 285 N.C. App. 501, 504, 877 S.E.2d 782, 784-85 (2022) (citation omitted). “This Court, under a *de novo* standard of review, considers the matter anew and freely substitutes its own judgment for that of the trial court.” *Id.* (citations omitted). This Court must determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (cleaned up). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *State v. Sanders*, 208 N.C. App. 142, 145, 701 S.E.2d 380, 382-83 (2010) (citation omitted). Furthermore, “[t]aking the evidence in the light most favorable to the State, if the record here discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then this court must affirm the trial court’s ruling on the motion.” *State v. McVay*, 287 N.C. App. 293, 296, 882 S.E.2d 598, 602 (2022) (cleaned up). When ruling on a motion to dismiss, the trial court’s role is to assess the sufficiency of the evidence, not its weight, to determine



whether it is adequate to allow the case to proceed to the jury. *Sanders*, 208 N.C. App. at 145, 701 S.E.2d at 383. “Contradictions and discrepancies” in the evidence are matters for the jury to resolve and do not justify dismissal. *Id.*

Defendant argues he sufficiently established the elements of perfect self-defense, and therefore, the trial court should have granted his motion to dismiss. Defendant contends that Hicks initiated the altercation when he struck Defendant’s hat with a baseball bat and then repeatedly hit him in the chest with the bat, forcing him to retreat into the kitchen. Further, it was reasonable for Defendant to believe that stabbing Hicks was necessary, and that such force was proportional, to prevent death or great bodily harm to himself.

To establish perfect self-defense, the following elements must exist at the time of the homicide:

- (1) the defendant believes he is in imminent danger of death or serious bodily injury; (2) that belief is reasonable; (3) the defendant is not the aggressor in the dispute or altercation creating the threat; and (4) the defendant’s use of force is not more than is reasonably necessary to protect himself or another person from death or serious bodily harm.

*State v. Fitts*, 254 N.C. App. 803, 806, 803 S.E.2d 654, 657 (2017) (citation omitted). If all four are present, the defendant sufficiency establishes perfect self-defense, which “excuses a killing altogether.” *State v. Revels*, 195 N.C. App. 546, 550, 673 S.E.2d 677, 681 (2009) (citation omitted).

Conversely, if the defendant can only establish the first two elements, then

imperfect self-defense is established, which “may reduce a charge of murder to voluntary manslaughter.” *Id.* “A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force.” *State v. Broussard*, 239 N.C. App. 382, 385, 768 S.E.2d 367, 369-70 (2015) (citation omitted).

When ruling on a motion to dismiss, even if there is evidence that is favorable to the defendant regarding each element of perfect self-defense, the trial court is justified in denying the defendant’s motion if there is also evidence favorable to the State. *State v. Presson*, 229 N.C. App. 325, 329, 747 S.E.2d 651, 655 (2013). Specifically, if the State presents evidence tending to show the defendant’s belief that it was necessary to kill was unreasonable, or that the defendant was the aggressor or used excessive force, the trial court may properly deny the motion and allow the case to proceed to the jury. *Id.* See also *State v. Corbett*, 269 N.C. App. 509, 525, 839 S.E.2d 361, 379 (2020) (“The trial court ‘must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.’”) (citation omitted).

In the present case, when considering the evidence in the light most favorable to the State, we hold the evidence establishes that Defendant did not act in perfect self-defense. We note there is no conflicting evidence as to the third element, whether Defendant was the aggressor in the altercation. Bannerman testified that Hicks

initiated the altercation when he hit Defendant's hat bill, continued his assault as Defendant tried to back away, and Defendant testified similarly. The State's evidence, however, sufficiently rebuts the remaining elements.

The State's evidence tended to show after Hicks had initiated contact with Defendant, the two wrestled until Defendant was on top of Hicks with Hicks lying on his back. Defendant then stabbed Hicks thirteen times. As Defendant stood up, he punched Hicks in the mouth and the side of the head. During the altercation, Defendant sustained a small cut to his left hand and a "mark" on his left bicep. The investigating officers testified that the home was not in such a state of disarray that one would conclude a struggle or brawl had taken place. The officers observed only a chair and a small table that were knocked over. Further, Defendant admittedly told law enforcement a different account of what happened that night than what he testified to at trial.

Although, Defendant asserted at trial that Hicks had him in a "reverse headlock," was choking him to a point he could not breath, and cut Defendant's hand with an object, the State presented evidence to the contrary. Bannerman testified that he did not remember seeing Hicks with a knife on that night. Defendant's injuries did not show that he was choked to such a degree, or cut so severely, that stabbing Hicks thirteen times was reasonably necessary to protect himself from death or great bodily harm.

"The lack of injuries to defendant, compared to the nature and severity of the

wounds on [the victim] at his death, is sufficient evidence from which a jury could find that defendant . . . used excessive force.” *Presson*, 229 N.C. App. at 330, 747 S.E.2d at 656. Moreover, “[t]his evidence alone is sufficient to allow a jury to find that defendant . . . used excessive force.” *Id.* The evidence at trial, including both testimony and photographs, established that Defendant sustained a small cut to his left hand and a mark on his left bicep. Hicks, however, was stabbed thirteen times and punched in the mouth and side of the head. The stab wounds caused physical disruption of his heart and resulted in him bleeding to death. Therefore, the disparity between Defendant’s injuries in comparison to Hicks’ injuries which ultimately led to his death, was sufficient evidence from which a jury could conclude Defendant had used excessive force.

The evidence, when viewed in the light most favorable to the State, sufficiently established that Defendant’s force was unnecessary and excessive. Sufficient evidence tends to show Defendant did not act in perfect self-defense. The trial court did not err by denying Defendant’s motion to dismiss on this ground and submitting the issue to the jury.

#### **B. Detective Short’s Testimony**

Next, Defendant argues the trial court abused its discretion by allowing Short to testify that a “true struggle” had not taken place in Hicks’ trailer on the night of his death. Defendant challenges the following testimony:

Q. So were there signs of struggle inside that -- inside that

single-wide?

A. I -- no. There was two pieces of furniture that were turned over inside the kitchen. I believe a small table and then one chair.

Q. Okay.

A. But "struggle" meaning like a true fight like you normally would see, or if you -- if the bat played into a role in this, you would expect --

[DEFENDANT'S ATTORNEY]: Objection.

THE COURT: Sustained. A lay opinion is admissible to explain the witness testimony or understand his testimony. The witness may testify as to what he observed: What did you observe?

Q. [ ] What did you observe?

A. I didn't see that no true struggle had taken place in there.

Q. Other than a turned table and a --

A. One small table and a chair.

While Defendant objected during Short's testimony, it does not appear that Defendant was objecting to Short's opinion on whether a "true struggle" occurred. Initially, the State asked whether there were "signs of struggle inside" and Short responded "no." Defendant did not object to this testimony. Therefore, it appears that the purpose of Defendant's objection was to prevent Short from testifying about what he would expect to see "if the bat played into a role in this."

On cross-examination Defendant asked Short, "So you said there -- you didn't

see signs of a struggle. You did not see signs of a struggle?” Short responded, “Inside the scene? I mean, the -- I told you the chair was turned over and one metal table, but it didn't look like a -- it's hard to explain. It didn't appear to me that a fight had -- a complete brawl took place in this mobile home.” On direct examination, the State asked Rackovan what she observed. She testified that “[it] [d]id not appear that there was a significant struggle.” The State proceeded to ask, “why do you say that?” and Rackovan responded, “[w]hile the house appeared to have been lived in, it didn't have a significant amount of disarray that you would anticipate with a significant struggle.” Defendant did not assert an objection during any of this testimony.

Under Rule 10 of the North Carolina Rules of Appellate Procedure, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). “It is well established that the admission of evidence without objection *waives prior or subsequent objection* to the admission of evidence of a similar character.” *State v. Augustine*, 359 N.C. 709, 720, 616 S.E.2d 515, 525 (2005) (cleaned up) (emphasis added). “Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (citations omitted).

Here, presuming *arguendo* the trial court erred by allowing Short to testify it

did not appear a true struggle had occurred in Hicks' trailer, Defendant failed to object to similar testimony. Defendant did not object to the State's prior question directed at Short, asking "were there signs of struggle inside." Defendant did not object to Rackovan's subsequent testimony that it did not appear there was a "significant struggle." Likewise, Defendant did not object when Rackovan testified the home did not have "a significant amount of disarray that you would anticipate with a significant struggle."

This testimony, specifically the references to a "true struggle" and "significant struggle," serves as evidence of a similar character. Each line of testimony speaks to the same conclusion, namely, that from the officers' observations of Hicks' trailer, it did not appear that a struggle or brawl had occurred between Defendant and Hicks. Moreover, the photographs of Hicks' trailer taken on the night of the altercation, and admitted into evidence without objection, supported this testimony. Therefore, Defendant waived his objection to Short's challenged testimony concerning whether a "true struggle" occurred on 3 July 2021.

### **III. Conclusion**

For the foregoing reasons, we hold the trial court did not err by denying Defendant's motion to dismiss. When viewed in the light most favorable to the State, the evidence does not show that Defendant acted in perfect self-defense. Further, Defendant waived his objection to Short's testimony by failing to object to otherwise similar testimony. Therefore, we conclude Defendant received a fair trial free from

STATE V. KEMPTON

*Opinion of the Court*

error.

NO ERROR

Judges TYSON and MURRY concur.

Report per Rule 30(e).